In the Supreme Court of the United States.

OCTOBER TERM, 1898.

LI SING, PETITIONER,
v.
THE UNITED STATES. } No. 689.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI.

STATEMENT OF FACTS.

The petitioner, Li Sing, in June, 1893, then a resident of Newark, N. J., returned to China, and took with him a certificate signed by the Imperial Government of China at its consulate at New York, and signed by its consul, that he was permitted to return to the United States, and was entitled to do so, and which, furthermore, styled him a "wholesale grocer." This certificate was viséed in Hongkong by the United States consul on June 27, 1896, when Li Sing was about to return to this country.

He thereafter returned by the way of Canada, and presented the certificate to the United States collector of customs at Malone, N. Y., who canceled it on August 28, 1896, and permitted him to enter the country. On January 6, 1897, the United States officer who is called the "Chinese inspector for the port of New York" represented, in writing and under oath, to John A. Shields, esq., United States commissioner for the southern district of New York, that Li Sing had unlawfully entered the United States, was unlawfully within that district, and that he was and had been for many years a Chinese laborer, whereupon he was brought before the commissioner for examination. The counsel for Li Sing insisted before the commissioner that by the action of the collector of customs at Malone the question of the Chinaman's right to be and remain in this country was *res judicata*, and, furthermore, that he was a merchant. Testimony to this effect was given by Chinese witnesses exclusively, which was received by the commissioner notwithstanding the objection of the attorney for the United States. The commissioner found upon all the evidence that Li Sing was at the time of the examination a Chinese laborer, was such at the time he departed for China and for a term of years prior thereto, and was such after his return from China in August, 1896; and simply ordered his deportation, and did not order imprisonment, as a punishment or penalty. A writ of habeas corpus and a writ of certiorari were thereupon allowed by the circuit court for the southern district of New York, upon Li Sing's petition, and, after a hearing, the writ of habeas corpus was dismissed and the petitioner

remanded to the custody of the United States marshal for deportation.

An appeal was then taken by the petitioner from the order of the circuit court to the circuit court of appeals for the second circuit.

It was conceded by the Government that the petitioner was admitted by the collector of customs at Malone, N. Y., into the United States on August 27, 1896, upon presentation of certain documentary evidence; but the Government's counsel objected to the reception of such documentary evidence as proof of any of the facts stated in it, as it was admitted merely to show what papers were before the collector inducing him to admit relator.

The petitioner offered testimony, principally that of Chinese persons, to show that he had been a merchant for more than a year prior to his departure from the United States in the summer of 1893. To controvert this testimony the Government, by numerous witnesses, established the fact that petitioner had been a laundryman for more than a year preceding his departure for China, and became such again immediately after his return to this country. These facts were established by the testimony of credible witnesses other than Chinese. (See testimony of Richard J. Crowley, Rec., fols. 67–81. John D. Wood, Rec., fols. 82–97. Philip A. Gifford, Rec., fols. 53–66. Thomas Scharf, Rec., fols. 98–102. Frank Speath, Rec., fols. 115–125. George W. Schenck, Rec., fols. 125–133.)

Upon the convicting testimony, as produced, the commissioner adopted the statements of the Government's witnesses.

By reference to the record (fols. 71–74, 58–60), it will be noticed that some of the Government's witnesses testified to attempts made by petitioner to bribe them to testify falsely that they knew him to be a merchant.

There was no attempt made to comply with the provisions of section 2 of the act of 1893, by showing that the mercantile business was conducted in petitioner's name (which has been considered to mean proof by the production of the partnership articles and books that they contain his name); nor, by the testimony of witnesses other than Chinese, that he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as merchant. Petitioner's position seemed to be that this statute did not apply to him, as it was enacted after he left the United States, but long before he returned to this country.

Judge Lacombe affirmed the findings of the commissioner, and ordered that the writ of habeas corpus be dismissed and that the petitioner be remanded to the custody of the United States marshal for the southern district of New York, for deportation under the order of deportation signed by Commissioner Shields.

The petitioner assigned errors to the court's decision as follows:

The holding:

First. That the action of the collector in permitting petitioner to enter the United States did not bar subsequent proceedings for his deportation.

Second. That the burden of proof was thrown upon petitioner to show his right to remain.

Third. That the petitioner should be deported.

The appeal was then heard on the foregoing assignments of error by the United States circuit court of appeals, second circuit, and on April 7, 1898, the following decision was rendered:

Before Wallace and Shipman, circuit judges.

SHIPMAN, circuit judge (after stating the facts as above). The questions which can be presented upon the writ of habeas corpus relate to the jurisdiction of the commissioner and the legality of the order of deportation. It is claimed that he had no jurisdiction, because the action of the collector at Malone was a finality, and that the relator can not be detained, because the provisions of the third section of the act of May 5, 1892 (27 Stat., 25), under which his examination was conducted, were in violation of the Constitution. The proceedings for Li Sing's deportation were instituted by Inspector Scharf, under section 12 of the act of May 6, 1882, as amended by the act of July 5, 1884 (23 Stat., 115), which provides that:

"No Chinese person shall be permitted to enter the United States by land, without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel, and any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came."

The required certificate in regard to persons not laborers was specified in the sixth section of the same amended act; was to be obtained from the Chinese Government by every Chinese person, other than a laborer, who was about to come to the United States; and was for the purpose of identifying the

person and evidencing the permission of the Government for his departure. The section provided that this certificate—

"Shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disapproved by the United States authorities."

It is not now contended that, under sections 6 and 12, the opinion of the collector of customs in regard to the character of the certificate was final. "On the contrary, the implication of section 12 is strongly in favor of the view that the jurisdiction of the courts of the United States in the premises was not intended to be interfered with." (*United States* v. *Jung*, Ah Lung, 124 U. S., 621, 8 Sup. Ct., 663.) Section 12 of the act of September 13, 1888 (25 Stat., 476), is the one upon which the relator relies. This act was passed to take effect, as a whole, upon the ratification of a treaty then pending between the United States and the Emperor of China, which was never ratified. Section 12 of this act provided that:

"The collector shall in person decide all questions in dispute with regard to the right of any Chinese person to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury and not otherwise."

If this section has gone into effect, and had continued to be in effect until August 27, 1896, when the collector at Malone acted in the matter, his decision would have been final. (*Nishimura Ekiu* v. *United*

States, 142 U. S., 651, 660; 12 Sup. Ct., 336.) The treaty not having been ratified, a new act, of October 1, 1888 (25 Stat., 504), was passed, which, as stated in *Wan Shing* v. *United States* (140 U. S., 424; 11 Sup. Ct., 729):

"Declared that from and after its passage it should be unlawful for any Chinese laborer, who at any time before had been or was then, or might thereafter be, a resident within the United States, and who had departed or might depart therefrom, and should not have returned before its passage, to remain in the United States. And it further declared that no certificate of identity, under which, by the act of May 6, 1882, Chinese laborers departing from the country were allowed to return, should thereafter be issued; and it annulled every certificate of the kind which had been previously issued, and provided that no Chinese laborer should be permitted to enter the United States by virtue thereof."

It will be noticed that section 4 of the statute of May 5, 1882, had provided for certificates of identity which could be given to Chinese laborers departing from this country and intending to return, and that this new statute of 1888 prohibited the future issuance of such certificate to the laboring class, so that—

"The result of the legislation respecting the Chinese would seem to be this: That no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein and have left with a view of returning, and that all other persons of that race, except those connected with the diplomatic service, must produce a certificate from the authorities of the Chinese Government, or of such other foreign government as

they may at the time be subjects of, showing that they are not laborers, and have the permission of that government to enter the United States, which certificate is to be visèed by a representative of the Government of the United States." (*Wan Shing* v. *United States*, *supra*.)

Section 3 of the act of October 1, 1888, provided that all the duties prescribed and powers conferred by section 12 of the act of May 6, 1882, already referred to, were made applicable to the provisions of the new act. It would seem from the contrariety between the acts of September and of October, 1888, that section 12 of the act of September 13, 1888, was not regarded as ever having gone into effect. (*United States* v. *Gee Lee*, 1 C. C. A., 516, 50 Fed., 271.) We intend to express no opinion in regard to section 13, of that act. The question is no longer a living one, for subsequently, in the act of August 18, 1894, c. 301 (28 Stat., 390), Congress provided that:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

This makes the decision a final adjudication only when adverse to admission. If the immigration or customs officer decides to allow the immigrant to enter such decision has no more force as a controlling adjudication, when the question of right to be or remain in the United States comes before court or commissioner, than it had under section 9 of the act of 1882, as amended in 1884, which was before the Supreme Court in *United States* v. *Jung Ah*

Lung, supra; In re Li Foon, 80 Fed., 881; *Lem Moon Sing* v. *United States*, 158 U. S., 538, 15 Sup. Ct., 967.

The relator asserts the unconstitutionality of the provisions of section 3 of the act of May 5, 1892, *supra*, which required a Chinese person who was arrested under the act to establish by affirmative proof his lawful right to remain in the United States, and of the provisions of section 2 of the act of November 3, 1893 (28 Stat., 7), which required a Chinaman to establish certain facts by the testimony of two credible witnesses, other than Chinese, upon an application for entrance into the United States on the ground that he was formerly a merchant in this country. It appears from the return to the writ of certiorari that all the witnesses for the relator were Chinese, but that the commissioner excluded nothing, and decided, upon the entire conflicting testimony, that the defendant was a Chinese laborer. The question of the constitutionality of section 2 of the act of 1893 does not, therefore, arise upon this record. The question of the constitutionality of provisions akin to those in section 3 of the act of May 5, 1892, in regard to requirements of proof, was settled in *Fong Yue Ting* v. *United States* (149 U. S., 698, 729; 13 Sup. Ct., 1016). The opinions of the Supreme Court in *Wan Shing* v. *United States* (140 U. S., 424; 11 Sup. Ct., 729) and in *Wong Wing* v. *United States* (163 U. S., 228; 16 Sup. Ct., 977) are also suggestive upon the extent of the power of Congress to make provisions merely for the deportation of aliens who are deemed to be unlawfully in the country. The order of the circuit court is affirmed.

POINTS IN SUPPORT OF GOVERNMENT'S CONTENTIONS.

POINT I.

NO QUESTION, EXCEPT THE ALLEGED FINALITY OF THE COLLECTOR'S DECISION, IS REVIEWABLE ON HABEAS CORPUS.

In criminal cases before committing magistrates, after defendant's commitment, the question is: Was there any legal evidence whatever to confer jurisdiction to commit and to sustain the commissioner's finding of probable cause?

Re Oteiza y Cortes, 136 U. S., 330.
Horner v. *United States*, 143 U. S., 570.
In re Chapman, 156 U. S., 211.
Ornelas v. *Ruiz*, 161 U. S., 502.
Sternaman v. *Peck*, 80 F. R., 883 (C. C. A.).

In the recent case of *Bryant* v. *United States* (167 U. S., 104) the Supreme Court, in habeas corpus proceedings, in review of the commissioner's commitment in foreign extradition cases, says:

> The question before us is even narrower than that, viz: Whether there was any legal evidence at all upon which the commissioner could decide that there was evidence sufficient to justify his commitment for extradition?

In habeas corpus proceedings to review orders under the Chinese exclusion acts the scope of review is necessarily much more limited than this even. The burden of proof here is on the defendant, not on the Govern-

ment, as in criminal causes, for section 3 of the act of 1892 expressly provides "that any Chinese person or persons of Chinese descent arrested under the provisions of this act or of the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." If the decision be adverse to the Chinese person, the judge or court subsequently on the habeas is in effect asked by relator to decide that, contrary to his own holding, the magistrate in the deportation proceeding was satisfied as to facts which he officially declared he was not satisfied of. As the statute vested the original magistrate with jurisdiction to determine whether he was or was not satisfied of such facts, the views of some other tribunal can not be substituted for his in the course of habeas corpus proceedings.

Compare *In re Tsu Tse Mee* (81 Fed. Rep., 702), in which such holding was had. See also *United States* v. *Chung Shee* (76 Fed. Rep., 951).—C. C. A.

Such view is also in line with the decision of the Supreme Court, rendered prior to this burden of proof section in the act of 1892, in which the court sustained the determination of the commissioner adverse to the Chinese person, in a Chinese deportation case, on uncontradicted testimony offered by the Chinese person, which the commissioner declined to believe. (*Quock Ting* v. *United States*, 140 U. S., 417.)

Point II.

THE DECISION OF THE COLLECTOR ADMITTING RELATOR DOES NOT BAR SUBSEQUENT PROCEEDINGS BY THE GOVERNMENT TO SECURE THE ADMITTED PERSON'S DEPORTATION.

In support of this, see Judge Lacombe's clear and lucid opinion *In re Li Foon* (80 Fed. Rep., 881, 882–883).

The Chinese exclusion acts, beginning with the act of 1882, vested the collector of customs with authority to exclude Chinese persons (subject to review by the court in all cases until the act of 1894 was passed), but these statutes nowhere made the collector's determination final and unreviewable. On the contrary, by section 6 of the act of 1882, and still more markedly by its amendments in the sixth section of the act of 1884, the certificates required of the Chinese person was made only prima facie evidence, and the amendatory act of 1884 (section 6) required the Chinese person, after admission, to produce it, whenever lawfully demanded by the proper authorities of the United States, and provided that "said certificate may be controverted and the facts therein stated disproved by the United States authorities." This same act of 1884, in its section 12, amended the act of 1882 (section 12) by providing judicial proceedings for removing Chinese persons found unlawfully within the United States, this being the section under which these proceedings have been had. In connection with this section it is important to notice that it applies only to cases of Chinese persons found unlawfully within the United States by

reason of an unlawful entry into the country. Until section 6 of the act of 1892 (the Geary law) was enacted, there was no statute which provided for excluding Chinese persons from this country for any act done within this country (for instance, failure to register), but merely for an unlawful entrance into the country. This statute (section 12 of the act of 1884), therefore, provides judicial proceedings for the deportation of Chinese persons who entered the country unlawfully, and clearly looks to judicial review of such admissions.

The courts have quite uniformly held that the admission of Chinese persons by the collector does not bar subsequent judicial proceedings by the Government.

The question was considered by the Supreme Court in the case of *United States* v. *Jung Ah Lung* (124 U. S., 621), and its holding, as well summarized in the syllabus, was that "the jurisdiction of the court was not affected by the fact that the collector has passed on the question of allowing the person to land, or by the fact that the treaty provides for diplomatic action in case of hardship." As said by Mr. Justice Blatchford in delivering the opinion of the court:

> We regard this as only a provision for specifying the executive officer who is to perform the duites prescribed, and that no inference can be drawn from that or any other language in the acts, that any judicial cognizance which would otherwise exist is intended to be interfered with.

The question has come up repeatedly also in cases exactly like this, where the collector admitted the Chinese person, and the Government subsequently instituted

judicial proceedings to secure his deportation for being in the United States unlawfully. It has been repeatedly decided, as was done by Judge Lacombe in *In re Li Foon*, that the Government was not prevented from instituting deportation proceedings by the collector's admission of the Chinese person.

> *United States* v. *Loo Way*, 68 Fed. Rep., 475.
> *United States* v. *Gee Lee*, 50 Fed. Rep., 271 (C. C. A.).
> *United States* v. *Chung Shee*, 76 Fed. Rep., 951 (C. C. A.).

The question is fully discussed and considered in the case of *United States* v. *Lee Way*, *supra*.

Second. The only case in which a contrary result was reached is the case of *United States* v. *Lee Hoy* (48 Fed. Rep., 825), which was reversed by the circuit court of appeals (ninth circuit) in *United States* v. *Gee Lee* (50 Fed. Rep., 271). This case below turns on the question whether the act of September 13, 1888 (25 Stat. L., p. 476), went into effect or not. If its section 12 became a law, the collector's determination as to Chinese persons entering this country by sea might be treated as conclusive, a view adopted by Judge Lacombe in *In re Li Foon*, where he holds that it had not gone into effect. Section 12 of this act provides:

> That before any Chinese passengers are landed from any such vessel, the collector or his deputy shall proceed to examine such passengers, comparing the certificates with the list and with the passengers, and no passenger shall be allowed to land in the United States from such vessel in violation of law; and the collector shall in person decide all questions

> in dispute in regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury, and not otherwise.

It will be noticed at the start that this section seems to apply only to Chinese entering the country by sea as passengers on vessels, and therefore does not meet this case at all, as relator entered the country at Malone, N. Y., on the Canadian frontier.

But section 13 is a part of an act passed September 13, 1888, entitled "An act to prohibit the coming of Chinese laborers to the United States" (2 Supp. Rev. Stat., p. 141), the first section of which provides:

> *Be it enacted, etc.*, That from and after the date of the exchange of ratifications of the pending treaty between the United States of America and His Imperial Majesty the Emperor of China, signed on the twelfth day of March, anno Domini eighteen hundred and eighty-eight, it shall be unlawful for any Chinese person, whether a subject of China or of any other power, to enter the United States, except as hereinafter provided.

The last section of the act (section 15) provides:

> That the act entitled "An act to execute certain treaty stipulations relating to Chinese," approved May sixth, eighteen hundred and eighty-two, and an act to amend said act, approved July fifth, eighteen hundred and eighty-four, are hereby repealed, to take effect upon the ratification of the pending treaty, as provided in section one of this act.

The treaty with China referred to in this act was never ratified, as China rejected it. Accordingly the

act was omitted from the second edition of the first supplement to the Revised Statutes, as explained in a note on page 625, and the Treasury Department, by circular dated May 7, 1892, stated: "The act approved September 13, 1888, being dependent upon the ratification of the then pending treaty with China, which treaty was not ratified, is omitted." After some years certain sections of it, particularly section 13, establishing judicial proceedings for deportation and appeal to the district court, were held to be in force in spite of the nonratification of the treaty. The only case which involved section 12 directly is the case in 48 Fed. Rep., 825, and 50 Fed. Rep., 271, in which the district court held that section 12 is in force, and the circuit court of appeals held that section 12 never went into effect, but section 13 of the same act did. There seems to be no jurisdiction to-day in this country in which section 12 is regarded as in force, but there are several where section 13 is treated as in force, though it has not been so treated heretofore in this district. It must be conceded that the reasoning in the various cases, pro and con, on this subject does not appeal to the judicial mind. A full discussion of the point follows:

The question whether sections 12 and 13 are in force or not is a pure question of law, for, as held in *Gardner* v. *Collector* (6 Wallace, 499), "the judicial notice of the court must extend not only to the existence of the statute, but to the time at which it takes effect, and to its true construction." The question was treated as one of judicial notice in all the cases under the Chinese deportation laws reported.

The acts of October 1, 1888, and of September 13, 1888, are totally inconsistent with each other, and the later act must be held to have repealed the earlier act, even if the latter ever went into effect. Thus sections 6 and 7 of the act of September 13, 1888, authorized Chinese laborers to return to the United States in certain cases, upon producing certain certificates. Sections 1 and 2 of the act of October 1, 1888, however, prohibited absolutely the return to the United States of Chinese laborers. Section 13 of the act of September 13, 1888, provided a procedure by judicial methods for the deportation of Chinese persons, and some such provision would be necessary with section 12 of the acts of 1882 and 1884 repealed. But in the later act of October 1, 1888, the procedure established by section 12 is expressly made applicable, and no reference to section 13 of the act of September 13, 1888, is found. Moreover, the act of May 5, 1892, by section 1, continued in force for a period of ten years "all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent." As the act of May 6, 1882, provided that it was to be in effect for ten years, a renewal was necessary, provided the act of September 13, 1888, which was not limited in duration, was not in force; not otherwise. In like manner conflicts would arise between section 12 of the act of September 13, 1888, and the act of August 18, 1894, which latter act provided that "in every case where an alien is excluded from admission into the United States, under any law or treaty now existing, or hereafter made,

the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." As far as Chinese aliens are concerned, this provision was already made in section 12 of the act of September 13, 1888, if that section went into effect, which covered rulings adverse as well as favorable to the Chinese persons' admission. As to aliens other than Chinese, there had been earlier statutes to this effect (see *Nishimura Ekiu* v. *United States*, 142 U. S., 651). As bearing on Chinese persons, then, this statute of 1894 either was new legislation or, if the act of September 13, 1888, went into effect, the act of 1894 impliedly repealed section 12, or it was wholly superfluous legislation. This statute was construed by the Supreme Court in *Lem Moon Sing* v. *United States* (158 U. S., 538), and the court treated it as new legislation in its relation to the Chinese laws, although no express reference was made to section 12 of the act of September 13, 1888.

A correct construction of the act of September 13, 1888, the history of the legislation preceding and following it, a consideration of the later statutes, and the practical construction of the acts, all show that no portion of the act of September 13, 1888, ever went into effect.

The Attorney-General, in an opinion delivered July 23, 1889, held that the act of September 13, 1888, did not go into effect (Synopsis Treasury Decisions, No. 9519); a view announced again by the Secretary of the Treasury March 28, 1890 (Synopsis Treasury Decisions, No. 9946), and May 7, 1892 (Synopsis Treasury Decisions, 12746). On February 21, 1894, Attorney-General

Olney advised the Secretary of the Treasury that "the present validity of this (which) act is, however, still an unsettled question."

On principle and under the authorities, then, the decision of the collector admitting the Chinese person does not bar subsequent proceedings. Such a holding is also required by public policy. The Chinese person selects the port or place of entry and produces his certificate or witnesses without any notice to the Government, which does not know in advance what persons will apply for admission, or at what places, or anything about the applicants and their witnesses. It is generally, from the nature of the case, impossible for the Government to make thorough inquiries before admission, and the fact that there are only a few ports of entry results in an enormous accumulation of business in those places. If the Government were prevented from thereafter going into the question, numerous persons not lawfully entitled to enter would be able to nullify and defy our laws and remain here, commonly profiting by their own criminality. So, also, it frequently happens that the collector decides these cases without jurisdiction, for instance, in mistaking the law and allowing a person to enter without the statutory certificate which is made the sole evidence in his favor (*In re Li Foon*, 80 Fed. Rep., 881). Clearly a decision rendered by him in such a case is null and void, because he had no jurisdiction at all.

In re Feinknopf, 47 Fed. Rep., 447.
Robertson v. *Frank*, 132 U. S., 17.
134, 907 Feet of Lumber, 4 Blatchf., 182.
Dutilh v. *Maxwell*, 2 Blatchf., 541, 544–545.

On principle and authority, therefore, the collector's admission of the Chinese applicant does not bar subsequent judicial proceedings by the Government.

Point III.

THE BURDEN OF PROOF WAS PROPERLY HELD TO BE ON PETITIONER TO ESTABLISH HIS LAWFUL RIGHTS TO REMAIN IN THE UNITED STATES.

Section 3 of the act of 1892 provides:

> That any Chinese person or persons of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner his lawful right to remain in the United States.

This statute is directly in point and is controlling. It was construed by the Supreme Court in the case of *Fong Yue Ting* v. *United States* (149 U. S., 698), which involved more particularly deportation of Chinese resident laborers for failure to register. The court said (p. 729):

> If no evidence is offered by the Chinaman the judge makes the order of deportation, as upon a default. * * * The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof, "by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act," is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the

courts of its own Government. (*Ogden* v. *Saunders*, 12 Wheat., 213, 262, 349; *Pillow* v. *Roberts*, 13 How., 472, 476; *Cliquot's Champagne*, 3 Wall., 114, 143; *Ex parte Fisk*, 113 U. S., 713, 721; *Holmes* v. *Hunt*, 122 Mass., 505, 516–519.) The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may at its discretion modify or repeal. (Rev. Stat., secs. 858, 1977.) The reason for requiring a Chinese alien, claiming the privileges of remaining in the United States, to prove the fact of his residence here at the time of the passage of the act, "by at least one credible white witness," may have been the experience of Congress, as mentioned by Mr. Justice Field in Chae Chang Ping's case, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, "was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained, by the witnesses of the obligations of an oath" (130 U. S., 598). And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision, which has existed for seventy-seven years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, "by the oath or affirmation of citizens of the United States." (Acts of March 22, 1816, c. 32, secs. 2, 3, Stat., 259; May 24, 1828, c. 116, secs. 2, 4, Stat., 311; Rev. Stat., sec. 2165, cl. 6; 2 Kent Com., 65.)

> The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from this country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the Government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.

Even before the act of 1892 the Supreme Court held that the magistrate was not bound to adopt the uncontradicted testimony in the case, if the circumstances were such as to prevent him from believing affiants. (*Quock Ting* v. *United States*, 140 U. S., 417.)

So, also, in numerous later cases arising under the act of 1892, and not involving the nonregistration provision (section 6 of the act of 1892), full force and effect has

been given to section 3, throwing the burden of proof on the Chinese person.

United States v. *Chung Fung Sun*, 63 F. R., 261 (Coxe, J.).
Lew Jim v. *United States*, 66 F. R., 953 (C. C. A.).
United States v. *Loo Way*, 68 F. R., 475.
In re Li Foon, 80 F. R., 881 (Lacombe, J.).
See also: *In re Sing Lee*, 54 F. R., 334.

Under the rigorous provisions of the act of May 5, 1892, as amended November 3, 1893, the burden was on the appellants to establish by affirmative proofs to the satisfaction of the commissioner their lawful right to remain in the United States. (27 Stat., 25, sec. 3, Laws 1893, c. 14, p. 7, Coxe, J., in *United States* v. *Chung Fung Sun et al.*, 63 F. R., 261.)

(2) In the present case, petitioner attempted to show that he was entitled to return to the United States and remain here, because he is and was a merchant. To sustain this contention, it was incumbent upon him to comply also with the provisions of section 2 of the act of 1893, which enacts:

> SEC. 2. The words "laborer" or "laborers," wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.
>
> The term "merchant," as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant

is a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.

Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as heretofore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing.

Such order of deportation shall be executed by the United States marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and pending the execution of such order such Chinese person shall remain in the custody of the United States marshal and shall not be admitted to bail.

The certificate herein provided for shall contain the photograph of the applicant, together with his name, local residence, and occupation, and a copy of such certificate, with a duplicate of such photograph attached, shall be filed in the office of the United States collector of internal revenue of the district in which such Chinaman makes application.

Such photographs in duplicate shall be furnished by each applicant in such form as may be prescribed by the Secretary of the Treasury.

Point IV.

The decision of the United States circuit court of appeals should be sustained, and this application for a writ of certiorari should be denied.

Henry L. Burnett,
U. S. Attorney for the Southern District of New York.

John K. Richards,
Solicitor-General.